

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,

v.

MARK A. BURRIS,

Defendant.

* Case No. 0812008196
* Cr.A. No. 09-06060767 & 8
*
*
*
*
*

Upon Defendant's Motion to Suppress

Submitted: March 29, 2010

Decided: April 22, 2010

Defendant's Motion is DENIED

Nicole S. Hartman, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware, 19904, Attorney for the State of Delaware

John R. Garey, Esquire, 48 The Green, Dover, Delaware 19901, Attorney for the Defendant.

Reigle, J

The defendant, Mark A. Burris, was charged with Driving a Vehicle under the Influence of Alcohol ("DUI") in violation of Del.Code Ann. tit. 21 § 4177(a) (1) and Driving Suspended/Revoked in violation of Del.Code Ann. tit 21 § 2756(a). The defendant, through counsel, moved to suppress the results of an intoxilyzer test, obtained after the defendant's seizure and removal from the scene of a motor vehicle accident on the grounds that the officer failed to have "probable cause" to believe that Mr. Burris had driven under the influence of alcohol. A suppression hearing was held on March 22, 2010. Closing arguments followed and written submissions were subsequently made by the Deputy Attorney General on March 26, 2010 and Counsel for the Defendant on March 29, 2010.

Facts

The first witness for the State was Jackson Pierre. He testified that he was driving to Polytech High School on December 11, 2008 in the Canterbury-Felton area when his motor vehicle was struck by another vehicle coming out of a driveway. He identified the defendant, Mr. Burris, as the driver of the other car. Mr. Pierre testified that the accident caused his vehicle's airbag to deploy and enough damage that the vehicle could not be driven. Mr. Pierre testified that a man came out of a house adjoining the driveway, stated that he was calling the police and went back inside. Mr. Pierre waited ten to fifteen minutes and then called his girlfriend who arrived and called the police. Subsequently, the police arrived. Mr. Pierre also testified it was cold, drizzling and the road was wet and slippery.

The second witness for the State was Corporal Sinclair of the Delaware State Police. He testified that he had been a Trooper for almost nine years and that he was

assigned to Troop 3. He testified that he received training on Driving under the Influence of Alcohol. His certifications were admitted. On the evening of Dec 11, 2008, he was assigned to the road as a uniformed officer. He responded to a location in Kent County, State of Delaware at approximately 6:15 p.m. and observed two motor vehicles on the scene. One was in a driveway and the other was on the side of the roadway.

Corporal Sinclair testified that he contacted Mr. Pierre, who was the driver of one of the motor vehicles. Mr. Pierre stated that the other motor vehicle pulled in front of him and struck his vehicle. He told the officer that the other driver was in the house but later identified Mr. Burris, when he came out of the house.

Corporal Sinclair spoke to Mr. Burris at the scene. He testified that Mr. Burris had glassy eyes and a moderate odor of alcohol about him. Mr. Burris admitted that he had a couple of drinks four hours earlier. In his report, Corporal Sinclair indicated that Mr. Burris' speech was fair and he made no unusual actions. Corporal Sinclair ran Mr. Burris' driving record and learned that his license was suspended or revoked. Corporal Sinclair testified that the roadway had no shoulder and that it was raining. In addition, there were other individuals on scene and he did not know who was in the house. For safety reasons, he removed Mr. Burris from the scene to take him to Troop 3 to conduct field sobriety tests.

On cross examination, Corporal Sinclair agreed that he did not do any "pre-exit" tests that could have been conducted in his patrol vehicle at the scene. He testified that he did not do a Horizontal Gaze Nystagmus test because the defendant could not stand in the car. He did not use a Portable Breath Test because he did not have one.

Once at Troop 3, Corporal Sinclair had the defendant perform field sobriety tests. He testified that Mr. Burris performed a One Leg Stand and that he swayed in the stance and during the test, that he tried to perform the test two times, that he was slow and that he repeated his numbers while counting. He testified that he also had Mr. Burris perform a Walk and Turn test and that he failed to follow the instructions, took too many steps, almost walked into a wall and raised his arms. He testified that Mr. Burris performed the Finger to Nose test and that he did it correctly but slowly and that he swayed during test.

One witness, Benjamin Miller, testified for the defense. He stated that he works for Mr. Burris. He was in the motor vehicle accident with Mr. Burris. He testified that it was cold, dark and drizzling. He did not talk to the officer at the scene. He also stated that he and Mr. Burris consumed vodka in the house after the accident.

Arguments

Defense counsel argued that there was insufficient “probable cause” for Corporal Sinclair to take Mr. Burris into custody. He asserted that to remove the defendant from the scene, the officer had to have “probable cause” that Mr. Burris had driven under the influence of alcohol. The officer could have conducted other tests in the patrol vehicle. He argued that an odor of alcohol and a motor vehicle accident was insufficient to establish “probable cause” as set forth in *State v. Silva*, CCP Cr.A. No. 90-03-0678, Bradley, J. (Aug. 28, 1990). He also submitted that the evidence of consumption of alcohol by the defendant after driving was defective to State’s case.

The Deputy Attorney General countered that there was not just the odor of alcohol and a motor vehicle accident but also the defendant had glassy eyes and made an admission of drinking before driving to the officer. She submitted that these factors gave

the officer “probable cause” to believe that the defendant had committed the offense of driving under the influence under the standard set in *State v. Glass*, 543 A.2d 339 (Del. 1988). She also submitted that other field sobriety tests were impractical at the scene because of the rain and safety considerations and that removal of the defendant from the scene was appropriate as it was reasonable and necessary under the circumstances as set forth in *State v. Maxwell*, 1996 WL 658993 (Del. Super.)¹. Once at Troop 3, the defendant failed several field sobriety tests and these results enhanced Corporal Sinclair’s probable cause to believe that Mr. Burris had committed the offense of Driving under the Influence.

In addition, the State submitted that the issue of drinking after the accident was a question to be considered by the jury, at trial.

Discussion

In *State v. Kang*, 2001 WL 1729126 (Del. Super.), the Court distinguished between an “investigatory detention,” which must be supported by an officer’s reasonable belief that a suspect has committed a crime and a “custodial arrest,” which must be supported by an officer’s possession of “probable cause” to believe that a suspect has committed a crime. A court must determine whether a seizure is an “investigatory detention” or a “custodial arrest” based upon the totality of the circumstances. Investigatory detentions must be minimally invasive and limited in scope to be justified. Police officers may transport suspects from a scene as part of an “investigatory detention” when such action is reasonable and necessary under the circumstances. *Kang* at 6 (*citations omitted*).

¹ Two different cases entitled *State v. Maxwell* are cited in this opinion.

In *State v. Peacock*, 2005 WL 1227788 (Del.Com.Pl.), the Court reiterated that subjects may be removed from scenes without “probable cause” as part of an “investigatory detention” when the transportation is necessary and reasonable under the circumstances. In that case the Court considered the police officer’s testimony that it was raining and the road was dark. The traffic stop occurred on an incline. For these reasons, the officer elected to have the defendant perform field sobriety tests at the Troop and removed him from the scene. The Court held that the transportation of the defendant was “reasonable and necessary” based upon those facts. *Peacock* at 5.

In the instant case, Corporal Sinclair testified that he arrived on the scene where Mr. Burris had been involved in a motor vehicle accident. He contacted Mr. Burris and determined that he had an odor of alcohol and glassy eyes. Mr. Burris admitted to the officer that he had consumed alcohol. I find that it was reasonable for Corporal Sinclair to believe that Mr. Burris had committed the offense of Driving under the Influence of Alcohol and to conduct an “investigatory detention” of Mr. Burris.

Corporal Sinclair testified that while he was detaining Mr. Burris, it started to rain hard. He testified that he placed Mr. Burris in his patrol vehicle because it was raining and that he refrained from having Mr. Burris perform field sobriety tests at the scene because there was no shoulder on the roadway and it was raining. In addition, he was the only officer on the scene, he did not know who else was in the residence and he could not secure the area. He was concerned for his own safety and for the safety of Mr. Burris. Under these circumstances, I find that it was reasonable and necessary for Corporal Sinclair to transport Mr. Burris to Troop 3 to conduct field sobriety tests as part of his “investigatory detention” of Mr. Burris.

An officer must possess "probable cause" that an individual has committed the offense of Driving under the Influence of Alcohol to require him to submit to an intoxilyzer test. *See Del.Code Ann. Tit. 21 § 2740.*

Probable cause exists when there are such facts which viewed in the totality of the circumstances suggest that there is a fair probability that the defendant has committed a crime." *State v. Maxwell*, 624 A.2d 926, 930 (Del. 1993) (*citations omitted*).

Corporal Sinclair testified that there was a motor vehicle accident. Mr. Pierre testified that Mr. Burris drove a motor vehicle out of a driveway and struck his motor vehicle while he was travelling down a roadway. It seems that Mr. Pierre had the right of way and there is reason to believe that Mr. Burris caused the accident. On the scene, Mr. Burris retreated into a house. There is no evidence that Mr. Burris called the police. When Corporal Sinclair arrived on the scene and contacted Mr. Burris, his eyes were glassy and he had an odor of alcohol. Mr. Burris admitted to Corporal Sinclair that he consumed alcohol that day.

Mr. Miller's testimony regarding the consumption of vodka after the accident by Mr. Burris was incredible. He was not believable because of his demeanor and his potential bias due to his friendship and employment with Mr. Burris. In addition, Corporal Sinclair testified that Mr. Burris did not report drinking after the accident to him, so it could be a factor that the officer could have used to mitigate his belief that the defendant had committed the offense of Driving under the Influence of Alcohol.


Mr. Burris performed poorly on his field sobriety tests at Troop 3. He had difficulty following instructions, completed the tests slowly, swayed and lost his balance. Based upon the totality of the circumstances, I find that Corporal Sinclair had probable

cause to believe that Mr. Burris had committed the offense of Driving under the Influence in order to require him to take an intoxilyzer test.

Decision

The defendant's motion to suppress any results of the intoxilyzer test on the grounds that the officer lacked "probable cause" to have the defendant take the test is DENIED.

IT IS SO ORDERED.


Anne Hartnett Reigle
Judge